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The Commonwealth of Massachusetts

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REVIEW OF PREVAILING WAGE ISSUES
ON THE CA/T and PUBLIC
CONSTRUCTION PROJECTS

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GOVERNMENT DOCUMENTS
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The Massachusetts House of Representatives Bureau of Post Audit and Oversight has conducted a review of issues surrounding the enforcement of prevailing wage statutes in the Commonwealth. The Bureau conducted interviews with individuals in the public and private sectors, and reviewed the current detection and enforcement procedures. In addition, the Bureau reviewed both the statutory scheme mandating the payment of prevailing wages and recently proposed legislation aimed at improving enforcement.

During previous investigations of public construction and contracting in the Commonwealth, the Bureau uncovered and referred to law enforcement authorities several violations of prevailing wage statutes. Based upon a request from a member of the Massachusetts House of Representatives, the Bureau has investigated allegations of prevailing wage violations as portrayed in local media reports and has received complaints directly from workers claiming employers have failed to comply with the statute. Reports of abuse of prevailing wage statutes on the Central Artery/Tunnel (CA/T) Project in particular caused the Bureau to focus its current analysis on ways to improve monitoring and to ensure enforcement through workable compliance measures. Based on its review, the Bureau makes the following findings.

Findings

1. The current statutory provisions which provide primarily criminal enforcement of prevailing wage violations are not sufficient to ensure substantial compliance.
2. Under the current statute, payroll reporting requirements are of limited value to enforcement officials who have no means of independently verifying the accuracy of submitted information. Reports of contractors violating the Commonwealth's prevailing wage statute have been an ongoing concern for state contracting authorities on public construction contracts.
3. Some truck owner-operators on the CA/T Project received net pay that was less than the prevailing wage because of disparities in equipment maintenance and operational costs that were not factored into contract rates for trucking services.

4. Contractors and state contracting agencies have failed to adequately inform employees that benefits can be included in the hourly rate of pay mandated by the prevailing wage statute.
5. The Massachusetts Highway Department and CA/T officials have recognized the need to be more aggressive in requiring compliance with prevailing wage provisions. Recently the CA/T Project has taken more expansive steps to improve compliance with prevailing wage statutes. With respect to the trucking issues, the Bureau recognizes that CA/T Project officials must also address complex issues such as health, welfare, and pension benefit eligibility for owner-operators.
6. The complex nature of the contractual arrangements for trucking on the CA/T Project make prevailing wage enforcement extremely difficult, if not impossible, under the existing statutory scheme.
7. Cost considerations on the CA/T Project have been an impediment to enforcement of prevailing wages on certain contracts.

History of Prevailing Wage Legislation

Massachusetts General Laws Chapter 149 Sections 26 through 27H establish the prevailing wage provisions applicable to state construction projects in the Commonwealth. In general, these provisions mandate that set wages be paid for specified job classifications of workers employed on public construction contracts in the Commonwealth. On public construction projects that receive federal funding, in whole or in part, the Davis-Bacon Act¹ sets forth the prevailing wage requirements for workers on those projects. Contractors on construction projects in the Commonwealth that receive federal funding are required to pay the higher of Massachusetts prevailing wages or federal wages as set forth in state and federal prevailing wage schedules.

Until 1993, enforcement of prevailing wage statutes was the responsibility of the Massachusetts Department of Labor and Industries (DOLI). However, under the provisions of the FY 1994 budget, all of the prevailing wage enforcement authority, as well as many other areas of labor related enforcement and regulatory responsibility, was transferred to the Office of the Attorney General. DOLI's successor, the Department of

¹ 40 U.S.C. 276A



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Labor and Workforce Development, remains responsible for the establishment of prevailing wage rates and the creation of job classifications.

Massachusetts Prevailing Wage Statutes

Under the provisions of Massachusetts General Laws Chapter 149, Sections 26 through 27H, an awarding authority must obtain wage rate sheets from the Department of Labor and Workforce Development prior to awarding a contract.² Wage rate sheets list the hourly rates of pay that each tradesperson must receive while employed on a public construction project.³ The wage rates are based on collective bargaining agreements negotiated in the geographic area where the work is to be performed. Wage rate sheets are made a part of the contract and remain in effect for the life of the contract.

Contractors and sub-contractors are required to submit certified payroll records to the awarding authority on a weekly basis and to the office of the Attorney General upon request.⁴ Under the statute, contractors are required to preserve payroll records for a period of three years from the completion of the contract.⁵ Penalties for violation of prevailing wage requirements are criminal and include fines, imprisonment and debarment of the contractor from public works contracts for specified periods.⁶

Essex County Privatization

Between 1993 and 1994, the Bureau conducted an independent analysis of the results of the privatization of highway maintenance in Essex County. During the course of its investigation, the Bureau discovered that sub-contractors hired to provide street sweeping services, as well as other contractors, appeared to be in violation of prevailing wage statutes. The Bureau found that some of the certified payroll records forwarded to MHD contained names and addresses that were fictitious.⁷ In some cases, street names listed for contractor employees did not exist. MHD claimed to have “checked” the

² M.G.L. c. 149 sec. 27

³ Id.

⁴ M.G.L. c. 149 sec. 27B

⁵ Id.

⁶ M.G.L. c. 149 sec. 27C

⁷ HPAO Interim Report: Review of Essex County Privatization, May, 1994, page 19.

certified payrolls, yet their review apparently failed to uncover the disparities. The Bureau referred the results of its investigation to the Attorney General's office for possible criminal prosecution. Several contractors were found guilty of multiple violations of prevailing wage requirements and other related charges as a result of the Attorney General's investigation of the Bureau's referral.

The Bureau notes, however, that in the course of its review it was only by verifying actual street addresses, social security numbers and tax filings that it was able to detect the erroneous filings. That task was labor intensive and time consuming and would be difficult for monitoring authorities without a substantial commitment of resources. Although the Bureau was successful in the Essex County case, broad based enforcement requires more accessible sources of independent verification.⁸ Enforcement of prevailing wage statutes at the subcontractor level was found to be onerous for awarding authorities. The Bureau found that general contractors had little or no incentive to get involved in the issue.

Truck Owner-Operators on the CA/T Project

MGL c.149, s.27 provides that prevailing wage rates apply "... to all persons engaged in transporting gravel or fill to the site or removing gravel or fill from such site, regardless of whether such persons are employed by a contractor or subcontractor or are independent contractors or owner-operators." Unlike any other covered trade, much of the truckers' work takes place away from the construction site, rather than on it. As a result, monitoring and enforcement of prevailing wage compliance is increasingly difficult. Because of the large amount of excavation and transportation of gravel or fill to or from the CA/T Project, trucking is an area of work that has produced several allegations of prevailing wage abuse.

Owner-operators who provide trucking services on public construction contracts have claimed that the rates paid by contractors and brokers, when netted against some of the owner-operators' costs, fall short of statutory prevailing wage rate requirements.

⁸ The Bureau notes that MHD did cooperate fully with the Office of the Attorney General once the investigation commenced.

Owner-operators who provide trucking services in support of CA/T Project work also complained that when the cost of operating their vehicles is subtracted from the total amount paid by the contractor or broker, the net wage amount received was well below the prevailing wage rate as determined by the commissioner.

The prevailing wage statute does not provide that in establishing wage rates the director should calculate or establish threshold amounts paid for equipment operations. The law requires owner-operators to submit certified payroll records stating that they have paid themselves the prevailing wage rate. These owner-operators contend that while the gross amount paid for equipment operation and labor may exceed prevailing wage rates, equipment operation costs are significantly higher than those necessary to allow for retention of labor payments that comply with prevailing wage requirements.⁹

The Bureau found that in the early stages of CA/T Project construction, many contractors had the perception that CA/T Project officials were not taking measures to ensure contractor payment of prevailing wages. Given the desire to keep project costs down and avoid public criticism, Project officials, in fact, did not have an incentive to strictly monitor the payment of prevailing wages. The Bureau found some support for the idea that contractors operated on the assumption that the prevailing wage statutes were not being enforced and often lowered their bids to reflect that fact. As more and more construction contracts were awarded, however, prevailing wage issues began to develop. While generally there were few prevailing wage problems with union contractors, prevailing wage issues surfaced on general construction contracts when areas such as trucking were being handled through subcontractors and brokers.

Recently, an agreement was reached on this issue with truckers that work on the CA/T Project. Future contracts will incorporate revised estimates of equipment operation costs to ensure that truckers are able to retain enough money for labor to cover prevailing wage requirements. Success in ensuring compliance in this area will become more critical for the CA/T Project in the near future. To date, a substantial portion of the

⁹ The Bureau notes, however, that the potential exists for substantial differences in operations costs among owner-operators on factors including, but not limited to, the age of the vehicle, the status of ownership and a variety of financing arrangements on the vehicle.

gravel and fill excavated by the Project has been hauled by truck to the Subaru Terminal where it is barged to Spectacle Island. However, with Spectacle Island at 85% of capacity, Project officials will soon begin directing gravel and fill to land based sites throughout New England. This will require a substantial increase in trucking services needed to haul the material.

The Bureau commends the CA/T Project officials for their efforts to reach agreement on these issues. The Bureau believes that the Project has taken the correct steps to address the problem and should be encouraged to continue its efforts in this area. The Bureau understands that health, welfare, and pension benefits issues, while ancillary to the prevailing wage issue, do represent significant concerns for the affected parties. The Bureau believes that the Project's efforts in this area are both reasonable and warranted.

Trucking Service Brokers

The Bureau noted that the current prevailing wage problem faced by truck owner-operators on the CA/T Project was in part attributable to the use of brokers. Prime contractors on the CA/T Project are required to pay prevailing wages for trucking services. In many cases, prime contractors have secured trucking services they require through brokers. Once an order is placed by a prime contractor, the broker subsequently contacts truck owner-operators to provide the trucking services needed by the prime. Some truck owner-operators have indicated that after the broker takes a profit from the prime contractor payment, there is not enough money to pay the truck owner-operators prevailing wages. As a result, these truck owner-operators claim they are forced to work for wages below the statutory minimum if they want to work on the CA/T Project.

Discrepancy in Perception

The Bureau conducted interviews with some workers who claimed that their employers had failed to pay prevailing wages as required under Massachusetts law. While the hourly rates paid appeared to be below prevailing wage rates, many workers were unaware that employers are entitled to include payments made to health and welfare

plans as well as pension or supplementary unemployment benefit plans when calculating the required prevailing wage payment.¹⁰ Under the prevailing wage statutes, such payments may be included in the calculation to determine the required rate. For example, a \$28.00 per hour prevailing wage can be comprised of \$24.00 dollars per hour for labor and \$4.00 per hour in pro-rated employee benefits. Employers who pay rates in this manner are in compliance with prevailing wage statutes.

The Bureau found that misunderstandings in this area caused confusion among some workers who thought they were not being paid prevailing wages when in fact their employers had complied with the statute. Increased education of workers employed by state contractors may increase awareness of statutory requirements. The Bureau believes that one way to improve compliance and increase awareness of statutory requirements is to separately state benefits on mandatory reporting forms. This would serve to educate workers and provide enforcement authorities with more detailed payroll information that could be used in enforcement investigations. Contractors should be required to present this information to employees in an effort to increase awareness.

The Need for Civil Enforcement of Prevailing Wage Statutes

The principal method of enforcement currently available to enforcement authorities is criminal prosecution under MGL c. 149. The Office of the Massachusetts Attorney General is responsible for prosecuting criminal cases against state contractors who fail to comply with prevailing wage statutes.¹¹ While criminal prosecution has been used to enforce the statute and collect money owed to workers, prosecutors face the difficult challenge of meeting the higher criminal standard of proof in each action brought against an alleged violator. This higher standard has hampered enforcement efforts where prosecutors have been unable to meet the required criminal standard of proof in cases of suspected abuse. Furthermore, limited enforcement resources are consumed on fewer cases of alleged abuse because of the effort needed to meet the criminal standard of proof

¹⁰ M.G.L. c. 149 sec. 27

¹¹ Attorney General's Fair Labor & Business Practices Division of the Business & Labor Protection Bureau.

required for conviction. As a result, the deterrent effect of enforcement efforts is undermined. Employers are more willing to run the risk of penalty when enforcement is limited by resource constraints.

Officials responsible for criminal prosecution of prevailing wage statutes have indicated that the addition of civil enforcement capabilities would greatly enhance the Attorney General's ability to pursue violators on a more comprehensive basis. Because civil enforcement would require a lower standard of proof than criminal enforcement, limited enforcement resources could be stretched to increase monitoring and enforcement. Increased enforcement capability would increase the deterrent effects of current resources aimed at ensuring compliance. In addition, civil enforcement would provide greater flexibility in crafting responses to alleged violations.

Civil remedies could help to ensure compliance without unnecessarily increasing the burden on the Commonwealth's criminal court system. Criminal court resources are already struggling to handle current case loads including a significant volume of violent crimes. Subjecting prevailing wage scofflaws to civil enforcement mechanisms as the primary enforcement mechanism could reserve criminal sanctions to the most egregious violations. Sources informed the Bureau that in general, it appeared that the already overburdened criminal courts were not inclined to prioritize prevailing wage cases when severe criminal matters, such as murder and other crimes of violence, warranted more of the court's attention. The primary purpose of the prevailing wage statute in the Commonwealth is to ensure that workers on public construction projects are paid fairly according to statutorily mandated pay rates. The Bureau's review indicated that this goal can best be accomplished by utilizing the significant advantages of civil enforcement.¹²

Vicarious Liability: Putting the Onus on State Contracting Entity

One of the most difficult hurdles faced by enforcement officials on the CA/T Project under the existing scheme is identifying which contractor is responsible for violation of the prevailing wage statute where multiple sub-contractors are employed by a

¹² The Bureau had several sources indicate that the courts were not inclined to treat prevailing wage cases as priority items unless they were part of a larger scam which included tax evasion and other crimes.

prime contractor or where construction work is performed by a joint venture. Enforcement efforts are more difficult when multiple layers of contract exist because enforcement officials must follow a complex payment trail to determine which contractor is in violation of the statute. Contracting agencies and the Attorney General should be able to hold prime contractors liable for sub-contractor prevailing wage abuse by incorporating standard language into every contract that would make prevailing wage payment a material element of the prime contract. The Bureau notes that holding contractors vicariously liable for payment of prevailing wages must be limited to civil enforcement and remedies and cannot impose criminal liability in this manner. The Bureau believes that the result would be increased pressure on contractors at every level to ensure compliance with prevailing wage requirements.

Payroll Record Cross Reference with State Tax Filings

The Bureau noted that enforcement officials are hampered in their efforts to enforce the prevailing wage statutes by lax reporting requirements. The prevailing wage statute currently requires contractors to submit weekly records that include the name, address, position, and salary of all employees working on a public construction contract.¹³ In addition, contractors must provide the agency with a sworn statement of compliance testifying to the accuracy of the payroll information.¹⁴ The purpose of this reporting requirement is to provide enforcement officials with a paper trail that would allow for verification of contractor compliance with prevailing wage requirements. The Bureau found that because enforcement officials have no independent means of verifying the accuracy of contractor payroll records, the records are of limited value in assisting enforcement efforts. In its investigation into privatization in Essex County, the Bureau discovered substantial discrepancies in records submitted by a sub-contractor that went undetected by both the prime contractor and the Massachusetts Highway Department.¹⁵

¹³ M.G.L. c. 149 sec. 27B

¹⁴ Id.

¹⁵ HPAO Interim Report: Review of Essex County Privatization, May, 1994 page 19.

The Bureau believes that enforcement efforts would be substantially improved by providing enforcement officials with an independent means of verifying contractor payroll information. The Bureau recommends that Massachusetts General Law Ch. 62C be amended to require that the Massachusetts Department of Revenue release tax information filed by a public construction contractors, upon a prima facie showing of a prevailing wage violation by the Attorney General. Tax records could then be used by enforcement officials to independently verify employee payroll information. Chapter 62C currently requires the Department of Revenue to release tax records for various other law enforcement purposes. Mandating disclosure of contractor tax information to the Attorney General's office on public construction contracts would substantially bolster the enforcement value of current prevailing wage reporting requirements.

Prevailing Wage Compliance as a Material Element of Public Construction Contracts

Based on its investigation, the Bureau concluded that creating civil enforcement mechanisms for the Attorney General to pursue abusers would be a valuable enforcement tool. In addition, the Bureau believes that contracting authorities in the Commonwealth should insert contract language in all public construction contracts making compliance with prevailing wage statutes a material element of the contract itself. The Attorney General could then be authorized to pursue civil contract damages as a means of enforcement. As with providing civil enforcement authority directly to the Attorney General, this enforcement option would make it easier to remedy prevailing wage abuse. The Attorney General could seek damages for breach of contract against any contractor that failed to pay workers prevailing wages.

The Bureau also recommends that the Department of Labor and Workforce Development explore the option of requiring contractor performance bonds for prevailing wages on all public construction projects. Contractors would be required to set aside specified funds in the form of a bond or other surety that would be forfeited in the event that the contractor was found to have violated prevailing wage requirements. Funds collected through the set aside requirement could be used in part to compensate under-

paid workers. Funds left over could be used to defray the substantial costs of prevailing wage enforcement or be returned to the contractor.

Recent Legislation

Proposed legislation filed for this session would provide the Attorney General with authority to issue civil citations for violations of prevailing wage statutes. Under this legislation, the Attorney General would have authority to issue civil citations in an amount not to exceed \$25,000, require employers to rectify the infraction, and make restitution to the aggrieved party. According to the Attorney General, the ability to pursue civil enforcement mechanisms would allow for increased enforcement capabilities through more efficient use of resources.¹⁶ Civil enforcement mechanisms would allow the Attorney General to improve responsiveness to complaints filed against employers while reserving criminal prosecution for the most egregious abusers.¹⁷

Other Issues

The Bureau also noted the special concerns presented by trucking and the statute that governs it. Generally, the prevailing wage statute mandates the payment of prevailing wages on specific sites where public construction projects are in progress. The statutes do not apply to off-site work, except for the trucking of gravel and fill material to off-site locations. Since truckers on a given construction project haul many different types of material to and from the job site, the obvious question has been raised as to why gravel and fill hauling mandates prevailing wage payment while the hauling of other material does not. Steel delivered by truck, for example, is not subject to prevailing wage laws. In addition, the Bureau notes that the prevailing wage statute is unclear with respect to whether off-site trucking is covered and to what extent. The Bureau found that this situation created significant confusion among truckers and, in particular, among truck owner-operators. The Bureau finds that the statute needs to be amended to clarify what types of material handled by truckers mandate prevailing wage payment. The special

¹⁶ Attorney General Business & Labor Protection Bureau Fiscal Year 1996 Annual Report, page 24.

¹⁷ Id.

circumstances of such a large amount of trucking services required by the CA/T Project and the construction industry's response to that market have created unique problems for both the awarding authority and the Attorney General.

Recommendations

1. The Bureau recommends that the Attorney General be empowered to enforce prevailing wage statutes in the Commonwealth through civil enforcement authority. The Office of the Attorney General should have the authority to issue civil citations to contractors who fail to pay prevailing wages on public construction projects. Criminal sanctions should remain available only for the most egregious cases of abuse where widespread criminal activity is suspected.
2. The ability to hold general contractors liable for failure of sub-contractors to pay their employees prevailing wages should be part of a comprehensive civil enforcement scheme designed to increase compliance.
3. The Bureau recommends that the portion of prevailing wages paid to employees in the form of benefits, including contributions to health and welfare plans or supplementary unemployment benefits, be stated separately on employee payroll records.
4. The Bureau recommends that the prevailing wage statute in the Commonwealth be amended in order to clarify what types of materials that are hauled by truckers mandate the payment of prevailing wages. In addition, the statute should clearly set forth what portion of over the road trucking is subject to prevailing wage requirements. The Bureau recommends that the Department of Labor and Workforce Development determine whether it has administrative jurisdiction to promulgate regulations aimed at clarifying this area of prevailing wage law through statutory interpretation.
5. The Bureau recommends that the Attorney General be provided with ultimate authority to shut down any construction project, or portion of a project, on which any contractor is shown to engage in a pervasive or systemic practice of failing to pay prevailing wages as required by law. The Bureau believes, however, that this extreme remedy must only be available when all other methods of enforcement have proven ineffective.
6. The Bureau recommends that the Department of Labor and Workforce Development and the Attorney General explore the possibility of requiring mandatory prevailing wage set asides for all public construction contractors.

Funds forfeited as a result of a failure to comply with prevailing wage statutes could be used to compensate under-paid employees.

7. Contracting agencies should be required to perform preliminary background evaluations or pre-qualification reviews on all prospective contractors to evaluate their history of prevailing wage compliance.
8. MGL Ch. 62C should be amended to allow the Attorney General to gain access to employment tax information filed by public construction contractors on public construction projects under certain limited conditions. This information could be used only to verify payroll information provided to the contracting agency.
9. Contracting agencies should insert contract language that would make compliance with prevailing wage statutes a material element of all public construction contracts. The Attorney General's office should be empowered to seek contract damages against contractors that fail to comply with prevailing wage statutes.
10. The Bureau recommends that the Department of Labor and Workforce Development explore the unique wage payment issues faced by truck owner-operators who are unable to receive prevailing wage labor payments after paying equipment maintenance and operation costs. The Department of Labor and Workforce Development should develop a prevailing wage payment system that will ensure that all truckers, including owner-operators, are paid prevailing wages for their services.
11. The Bureau recommends that a Task Force be convened to develop comprehensive solutions to the prevailing wage issues raised in this report. The Task Force should include representatives from the Attorney General's Office, MassHighway, the CA/T Project, and the Department of Labor and Workforce Development. The goals of the Task Force should be to improve compliance with the Commonwealth's prevailing wage laws through legislative and regulatory proposals aimed at solving current, and anticipated, compliance issues.

Conclusion

The current system of prevailing wage enforcement is burdensome and in large part unenforceable. Substantial revision of the Commonwealth's prevailing wage law needs to be enacted. Reliance upon criminal prosecution as the only enforcement tool and sole means of deterrent places the Attorney General's Office in a difficult enforcement position. Under the current scheme, enforcement is especially difficult

where large construction contractors and multiple contracting entities are involved. The awarding authorities need to be more aggressive in contracting provisions so that enforcement is made part of contractual process.

CA/T Project and MHD officials have had extended discussions with the Bureau and a copy of their comments is attached. The Bureau acknowledges MHD's cooperation here and believes that their actions are positive in what is admittedly a difficult monitoring and enforcement scheme. The Bureau supports MHD's efforts to improve the Commonwealth's prevailing wage statutes and looks forward to the positive effects those efforts will create. In addition, the Bureau recognizes the Department of Labor and Workforce Development for its cooperation with the Bureau and looks forward to its continuing efforts to address prevailing wage issues. The response by the Department of Labor and Workforce Development to the Bureau's report is also attached.

MASSACHUSETTS HIGHWAY DEPARTMENT**COMMENTS:****HOUSE POST AUDIT AND OVERSIGHT BUREAU REVIEW OF
PREVAILING WAGE ISSUES ON THE CA/T PROJECT AND
PUBLIC CONSTRUCTION PROJECTS**

October 20, 1997



Introductory Comments:

In response to truck owner-operators' allegations of contractor non-compliance with the prevailing wage law on the Central Artery/Ted Williams Tunnel Project, and prior to the opening of the Bureau's investigation, MHD undertook significant measures to address the range of issues which have arisen from varying and confusing interpretations of the law's requirements. While MHD has made tremendous progress in this area, it has encountered difficulties and barriers to resolving such issues. They include: statutorily mandated certified payroll record reporting requirements; confusion about the nature and types of trucking activities actually covered by the law; monitoring difficulties arising from the fact that the majority of truckers' time is spent off site; and the longstanding industry practice of procuring trucking services "by the load" rather than "by time."

Given its experience, MHD recognizes the inherent difficulties facing all entities responsible for monitoring and enforcement of prevailing wage requirements. MHD agrees that legislative revisions to the prevailing wage law are appropriate and, as the awarding authority performing the largest amount of public construction in the Commonwealth, MHD looks forward to the opportunity to participate in the development of a comprehensive solution.

Recent MHD accomplishments include the CA/T Project Memorandum of Agreement on Trucking Issues, the Memorandum of Understanding as to Teamster Benefits, establishment of aggressive and effective labor compliance measures, and improved coordination with law enforcement agencies, including the Attorney General's Office. In addition, as it did in the Essex County privatization cases, MHD continues to cooperate fully with agencies charged with enforcing prevailing wage provisions and refers allegations of contractor violations for investigation.

MHD provides the following comments to the Bureau's Recommendations:

1. MHD agrees that the present statutory scheme, particularly as it relates to prevailing wage applicability and enforcement, needs to be modified on a comprehensive basis. MHD agrees that civil enforcement power should be evaluated as part of the statutory review. MHD is prepared to play an active role in any effort to improve or clarify the existing prevailing wage statute. As the awarding authority performing the greatest percentage of public construction work in the Commonwealth, MHD's participation is critical. Indeed, all constituencies affected by this issue, including the Department of Labor and Workforce Development, the Attorney General's Office, representatives of the prime and subcontractor communities, and labor should be involved in this review process.

2. MHD has taken steps to contractually hold contractors accountable for the payment of prevailing wages to truck owner-operators and employees of subcontractors of any tier. For example, MHD has issued deficiency reports to, and withheld progress payments from, contractors who have failed to provide acceptable certified payroll records within reasonable cure periods. The notion of imposing vicarious liability among prime contractors for the failure of subs to pay appropriate wages to employees, however, should only be considered with a host of safeguards built in to such a provision.
3. MHD agrees that consideration should be given to revising statutory payroll record requirements so that base wages and the portion of prevailing wages paid owner-operators or employees in the form of benefits, including contributions to health and welfare plans or supplementary unemployment benefits, are stated separately. This recommendation should be reviewed with the Department of Labor and Workforce Development.
4. In addition to clarifying the types of trucking covered by the state prevailing wage law, attention should be given to whether, and what extent, over the road portions of the work is covered. Consideration needs to be given to the fact that trucking is a unique activity within the prevailing wage law because, unlike other laborers who perform their duties entirely on the job site and who are known to project inspectors, truckers spend very little time on site. Most of their time is spent alone away from the project's location. In addition, truckers often work on more than one project (both prevailing wage and non-prevailing wage) in a given pay period and/or haul different materials (some covered and others not) within that period.
5. MHD objects strongly to the notion that the Attorney General should be empowered with the authority to shut down a construction project. Public works projects already impose significant impacts on the motoring public and other users and abutters of the highway or bridge facility. Shutting a project down would impose significant additional hardships. Other remedies are available by contract, including actions to enforce prevailing wage provisions under the required payment and performance bonds. Such action with bonding companies can be very effective in securing contractor compliance with contract specifications because of significant impacts on a contractor's ability to secure bonding necessary to bid on and procure future work with the Commonwealth.
6. MHD believes that adequate protections are already provided by statute and contract. Prevailing wage compliance is mandated by the Standard Provisions for Highways and Bridges incorporated into all MHD contracts. In addition, prevailing wages are among the class of items covered by performance and payment bonds mandated by M.G.L. c. 149, §29. The text of §29 itself, is incorporated into MHD's Standard Provisions. MHD is concerned that the addition of some other mandatory provision for prevailing wage "set-a-sides" would be needlessly redundant and may artificially drive up costs on public works projects.

7. All factors concerning contractor performance are made part of the prequalification review conducted by MHD in accordance with M.G.L. c. 29, §8B. In addition, contractors which have been debarred pursuant to M.G.L. c. 29, §29F, are prohibited from bidding on public construction projects during the term of their debarment. Notice of debarment for prevailing wage violations is routinely provided by the Attorney General's Office. Such notices are made a part of a contractor's prequalification file at MHD.
8. Investigators conduct field interviews with truck drivers, at payroll time, to determine the accuracy of payroll records. Performing these interviews randomly puts affected individuals on notice that they are subject to such spot checking and provide the Attorney General's Office with a statistically accurate measure of compliance. MHD's labor compliance officers and resident engineers conduct random field interviews on a monthly basis.
9. Prevailing wage compliance is already mandated by MHD contract language and it is among the class of items covered by payment and performance bonds required by its contracts. (See comments to item 7, above.) Careful consideration should be given to the manner in which other contract remedies are crafted.
10. MHD agrees that the Department of Labor and Workforce Development should play a major role in any effort to improve the Commonwealth's prevailing wage scheme, including addressing the unique issues related to truckers.

Conclusion:

MassHighway appreciates the opportunity to provide written comments to the report's recommendations. We are anxious to participate in the development of a comprehensive approach to monitoring and enforcement of prevailing wage compliance on public works projects.



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October 20, 1997

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Re: Prevailing Wage Report

Dear Mr. Hammond:

Angelo Buonopane, Director of the Department of Labor and Workforce Development ("DLWD"), asked me to respond to your request for comments on the draft report entitled: Review of Prevailing Wage Issues on the CA/T and other Public Construction Contracts (the "draft").

In general, the draft was well-researched and presented thoughtful discussion of many of the issues associated with the Commonwealth's prevailing wage laws (particularly with respect to trucking) and offered some reasonable solutions. Outlined below are a few areas that we believe may need some further review.

1. Civil Penalties

Pages 7 and 8 of the draft and Recommendation 1 discuss the need for "civil penalties" as an alternative to the existing criminal penalties available in the statute. We believe the report needs to make clear whether the Bureau is recommending 1) that the Attorney General ("AG") be given the power to bring civil actions in District or Superior Court for violations of the prevailing wage law or 2) that the AG have the power to issue civil administrative penalties (which can be issued without instituting a law suit) which would be adjudicated through an administrative hearing process. The arguments contained in the draft for seeking alternatives to criminal prosecution would apply to both options. Therefore, we believe the draft should make clear which remedy is being proposed and tailor the justifications for whichever option is being recommended.

2. Vicarious Liability

Pages 8 and 9 of the draft and Recommendation 2 propose that general contractors ("GCs") be held vicariously liable for subcontractors' failure to pay the prevailing wage to the subcontractors' employees. Although we recognize the need for additional prevailing wage enforcement mechanisms,



